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What Is "In Court"? Relief from Erroneous Assessment. The Two Years Limitation.

In the case of *Moore* v. *County of Henrico,* a case which went up from the Circuit Court of Henrico County, our Supreme Court of Appeals dismissed the petition for a writ of error without rendering any opinion. As the question raised is a somewhat novel one we have obtained a copy of the record and briefs and think it might be of interest to give a brief statement of the case.

T. L. Moore owned certain bank stock which was assessed by the County of Henrico at the rate of 12/100 per centum. He contended the tax should be at the rate of 3/10 of one per cent on the value of said stock:

Section 571 of the Code provides:

> "Any person assessed with County or city levies and other local taxes, on lands or other property, aggrieved by any such assessment, may, unless otherwise specifically provided by law within two years from the first day of September of the year in which such assessment is made *apply for relief to the Circuit or Corporation Court of the County or City* wherein such assessment was made; and thereupon the Court shall order that he be exonerated from the payment of so much as is improperly assessed, if not already paid, and if paid, that it be refunded to him by the treasurer who shall have credit for the same in settlement."

On the 30th day of August, 1917, two days before the expiration of the period allowed by the statute, Moore filed in the Clerk's Office of the Circuit Court of Henrico County a petition setting out the pertinent circumstances of his case and praying for the relief contemplated by the statute. At that time the Circuit Court of Henrico County was not in session, nor had it been since the 31st day of July previous. The fall term

did not commence until the first Monday in October and Moore on the 26th day of October moved the Court to docket his petition, which motion was opposed by counsel. The Circuit Court refused to docket the petition and dismissed the same upon the ground that under the section quoted above applications of this sort could only be made *in open court;* that the filing of the petition in the Clerk's Office is not sufficient and that therefore Moore had lost his remedy by lapse of time.

The question is whether filing a petition in the clerk's office in vacation is a compliance with the terms of the statute?

It may not be uninteresting to examine in connection with this case the various statutes in regard to relief from erroneous assessments, and it must be noted with regret that there is a difference, with no earthly reason why there should be any, as to the method of approaching the tribunal in which relief can be afforded—certainly as to one case. Section 444, dealing with erroneous assessments of lands provides that the party aggrieved may "apply to the *Circuit Court* of the county or corporation in which the land lies," etc., etc. Section 2206, dealing with railroad and canal corporations, provides that such railroad or canal corporation may, etc., etc., within *thirty days* after receiving a certified copy of the assessment, etc., "apply to the *Circuit Court* of the City of Richmond," etc., etc. Section 437a, dealing with assessment of mineral lands, provides, amongst other things, that any person aggrieved, etc., may make application to have the assessment corrected. "The said application may be made either by motion *in open court* or by filing a petition in the clerk's office of said Circuit Court, etc., etc., and said Court *at its next term,* etc., shall hear said cause.

This section was amended March 12th, 1912—Acts 1912, p. 62, providing that the application may be made *by filing a petition in the clerk's office* of said Court," etc., etc.

It was claimed by Moore that these statutes were *in pari materia* and should be construed together and effect given to them all.

Now let us for a moment consider how the application is to be made.

In Section 571 application is to be made "to the Court.

In Section 444 application is to be made "to the Court."

In Section 2206 application is to be made "to the Court."

In Section 437(a) before its amendment application is to be made "by motion in open court OR by filing a petition in the clerk's office."

As amended Section 437(a) provides for filing "a petition in the clerk's office."

This amendment, it appears to us, has a very important bearing on the subject and would seem to indicate that the Legislative mind had had its attention called to the subject and had differentiated as to the method in which the tribunal given authority to correct erroneous assessments was to be approached:

In the first three instances application was to be made "to the *court,*" and to the court alone. No mention was made of any clerk's office. If an application filed in the clerk's office is the same thing as an application filed *in court,* then the amendment would have been useless and the act could have been amended in a simpler way by striking out the words "open" and "by filing a petition in the clerk's office of said Circuit Court."

Another question may well be asked: Could a person aggrieved apply under Section 437(a) as amended "to the Court," directly? We take it he could not. His only method of getting into Court is by means of a petition filed in the clerk's office. The other sections give no such right. Application must be made "to the Court." Now there is no such thing as "a court" in vacation. The Court cannot act in vacation except in certain instances in which authority is expressly given by statute. How then can an application be made *to the Court* when the Court is not in session and, reading the various statutes together, is it not clear that the Court in session is the only place in which an application can be made in the first three cases, and that the clerk's office is the only place in which application can be made in the last.

It was urged with much force that there is a decided distinction between "in open Court" and "in the Clerk's Office" and "to the Circuit or Corporation Court." The question was asked, How can an application be made "To the Court" when it is not in session, except through the Clerk's Office? and that therefore, when the words "in open Court" were used it was a clear

indication that application in the other cases was to be made to the court in the way applications are usually made when the Court is not "open." And again: That the expression "to the Court" indicated nothing more than the particular tribunal which is vested with the jurisdiction in such cases, without any reference to the method of approach—that is to say, the application must be made to the *Circuit* Court of the *Corporation* Court, as the case may be—not to any other court or to the Board of Supervisors or to the City Council. Very frequently, not only in common parlance but in legal terms, we constantly speak of applying to a certain court for relief, when there is no thought of making such application *in open* Court. This language, it was urged, could be used with equal propriety touching a bill filed at rules or in an attachment sued out of the Clerk's Office; that it is a general expression covering any sort of resort to law for the redress of a grievance. A motion to be made "in open Court" is quite a different thing, this being a specific mode of procedure which must be followed. The same rule applies when an applicant is specifically told to file his petition in the Clerk's Office. In either event there is no choice. The expression "apply to the Circuit Court," it was claimed does admit of a recourse to that tribunal either directly or indirectly.

It will be noted that Section 2206 requires the application to be made within *30 days* to the Circuit Court of Richmond. The question is asked, How can that be done if the application has to be made "in open Court" when the Circuit Court of Richmond is not in session for three or four months at a time?

That there is force in these arguments cannot be disputed; but it will be noticed that the only statute in which the words "in open court" were used has been amended so as to allow the application to be made in the Clerk's Office. The argument as to the failure of the Circuit Court of Richmond to hold its terms so as to allow a compliance with the statute avails nothing in our judgment, as the Legislature is not supposed to know that a court does not meet at the times required by law, but supposes the courts to sit with such regularity as to allow the suitors to comply with the statute.

But even if it were otherwise this is a wrong which the Legislative body and not the courts must correct.

We should have noticed in the beginning of this editorial that Moore's proceeding in the Court of Appeals was for a *mandamus* requiring the Circuit Judge to hear the petition, or for a writ of error in the alternative. But the Court of Appeals declined to grant either.

We are, however, constrained to think the Court was clearly right in refusing either a mandamus or a writ of error and the reasons are plain when the statutes are read together and compared. At the same time we think that the statutes ought to be amended and brought into conformity. There is no reason why a petition should not be filed in the Clerk's Office in every case and notice given to the attorney for the Commonwealth, such notice to be issued by the Clerk.

The present method of proceeding in Court is in our experience a very lax one and attended with undue haste and without sufficient care exercised by the authorities. There can be no objection whatever to the petition in the Clerk's Office, especially in view of the fact that owing to our courts not being always in session a great hardship may be worked—as in the present instance.

The Last Clear Chance.

It is seldom that the courts enter fully into the combination of physiological and physical conditions affecting humanity. And yet there is no reason they should not do so. The instructions refused in *Norfolk Southern Railroad Co.* v. *Smith,* decided January last, and for which the case was reversed, were as follows:

"The Court instructs the jury that the law recognizes the fact that the nerves and muscles of men are not so co-ordinated that there can be instantaneous action to meet an emergency, and if you believe from the evidence that the plaintiff's automobile was suddenly stopped on the track, you cannot find for the plaintiff unless you believe that the plaintiff has proved by the preponderance of the evidence that in contemplation of the entire situation after the danger became known to the motorman or ought to have been discovered by him, by the exercise of ordinary care, he, the motorman, negligently failed to do something which he had a last clear chance to do to avoid the accident."

That the latter part of this instruction is good law no one can question. That the language as to the statement of the fact that the nerves and muscles of men are not so co-ordinated that there can be instantaneous action to meet an emergency is based upon an expression of Judge Keith's in *Norfolk Southern R. Co.* v. *White's Admr.*, 117 Va. 342, is equally true. But is this statement an absolutely correct one from the experience of humanity? Was it a necessary part of the instruction? Is it absolutely true in all cases? We do not think so. There are many instances in which no perceptible time can be observed between the co-ordination of the nerves and muscles. Can any one count the time which elapses between a threatened injury to the eye and the closing of the eyelid? Or the time which elapses between a blow and the arm thrown up to ward it off? At many times there is an automatic movement of the muscles which seems almost identical in time with a threatened danger and the party moving seems almost unconscious of the very movement itself. Our objection to incorporating Judge Keith's language in an instruction is that the language is too broad and should have been qualified, it seems to us, by the statement that "in many instances the nerves and muscles of men are not so co-ordinated," etc. Judge Keith's language is not borne out by writers on psychology, but the contrary opinion seems to be that in a great many instances the mind seems to move the muscles with a speed no ordinary time-piece ever invented by man can measure. We believe a great many such co-ordinations take place in the fifteenth part of the second. The danger in the courts laying down as a rule of law such a condition of affairs is that it is liable to mislead a jury, who cannot be supposed to be acquainted with psychological and finely drawn physical conditions of the mind and body. Judge Keith's language was not necessary to a decision of the case in which it was used and there is always danger of a dangerous precedent founded on mere *obiter*. More than one such instance has occurred.

An Inference upon an Inference: Mistaken Precedents.

The danger of making precedents by careless use of language or by carelessly interpreting a rule, is very clearly shown in the case of *C. & O. Rwy. Co.* v. *Ware,* decided by our Supreme Court of Appeals last January. In a very illuminating opinion Judge Sims delivering the unanimous opinion of the Court, shows that the often repeated statement that an "inference upon an inference" will not be permitted, is based upon a misleading statement in *Starkie Upon Evidence,* Section 57, which has been blindly followed by many of the courts. We cannot forbear quoting at length that portion of the opinion which deals with this important subject:

> "The rule that 'an inference cannot be based upon a presumption,' or, what is the same rule, that 'an inference cannot be based upon an inference,' is invoked as fatal to the plaintiff's case. It is urged with much ability and force by counsel for defendant that, in the consideration of circumstantial evidence, an inference cannot be based upon an inference or presumption. That an inference or presumption cannot form the basis of fact from which another inference of fact may be drawn. That at most, in the instant case, all that can be said is that the jury were warranted in drawing the inference or presumption that the train passed as aforesaid. That there is no *direct* proof of it as a fact. That only from facts which have been proved by *direct evidence* can the jury properly draw an inference of fact. Hence, the jury could not use this inference or presumption that the train passed as aforesaid as an intermediate fact from which to make a second inference that the fire originated from the train.
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> We are cited on this point only to the cases of *C. & O. Ry. Co.* v. *Heath,* 103 Va. 64, and *N. & W. Ry. Co.* v. *Cromer,* 99 Va. 763. This statement in these cases of the rule invoked is this: 'An inference cannot be drawn from a presumption, but must be founded upon some fact legally established.' The latter case quotes this rule from *Bailey on Personal Injuries* (1st Ed.) § 1675.
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> "The rule referred to is firmly established and is a correct and wise rule when correctly applied.
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> "Referring to the rule that an inference cannot be drawn from an inference or presumption, McCabe, J., in delivering the opinion of the court in *Henshaw* v. *State,* 147 Ind. 334 at p.

363, says: 'There is an important exception to that rule, however. A *fact* in the nature of an inference may itself be taken as the basis of a new inference, whether intermediate or final, provided the first inference has the required basis of a *proved fact. Burrill Civ. Ev.,* p. 138; *Best on Pres.,* § 187; 1 *Greenl. Ev.,* § 34.' (Italics supplied.) Reference to the authorities cited by Bailey on Personal Injuries, *supra,* and to the two Virginia cases cited, *supra,* makes it clear that the presumption or inference referred to in the rule in question is a presumption or inference which may and often should be drawn but which in the case in which the rule in question is applied is not a *proved fact.* If the inference or presumption is based on such evidence that it may be regarded as *a fact proved* in the case, then, although the evidence on which it is based may be circumstantial evidence, such inference or presumption of fact may itself form the basis for another inference of fact, equally as if it had been proved by direct evidence. 1 Wigmore on Ev., § 41.

"The last cited learned author dealing with the rule under consideration unqualified by the exception above referred to, says:

" 'It was once suggested that an "inference upon an inference" will not be permitted, i. e., a fact desired to be used circumstantially must itself be established by testimonial (direct) evidence; and this suggestion has been repeated by a few courts and sometimes actually enforced. There is no such rule, nor can be. If there were, hardly a single trial could be adequately prosecuted * * * All departments of reasoning, all scientific work, every day's life and every day's trials, proceed upon such data. The judicial utterances that sanction the fallacious and impractical limitation originally put forward without authority must be taken as valid only for the particular evidentiary facts therein relied upon.'

"It should be noted that an examination of all the cases cited by the learned author last quoted to that portion of the text above set forth which alludes to the unqualified rule that 'an inference upon an inference' has been repeated by a few courts and sometimes actually enforced, discloses that all of such cases which repeat and those which enforce the rule mentioned, either contain a quotation from Starkie Ev., § 57, or refer to cases which do contain that quotation. The latter quotation is as follows: 'In the first place, as the very foundation of indirect proof in the establishment of one or more facts from which the inference is sought to be made, the

law requires that the latter should be established by *direct* evidence, in the same manner as if they were the very facts in issue.' Here seems to be the source, so far as we have discovered it, of the misconception which has arisen in the few cases where the rule has been enforced unqualifiedly, referred to by Mr. Wigmore. The word *'direct'* is underscored in the quotation from Starkie on Evidence as found in one of the earliest cases we have examined containing it. We have not had access to the edition of Starkie on Evidence containing this language. Mr. Wigmore cites the edition of 1824. The text of Mr. Starkie, quoted as aforesaid, is undoubtedly misleading. But the text itself, upon a careful reading of it, discloses that the *direct* evidence therein referred to is not *direct evidence* in the usual (but as Mr. Wigmore says in the incorrect) meaning with which that phraseology is used, distinguishing such evidence from circumstantial evidence. (Mr. Wigmore avoids this confusion by designating the former evidence as *'testimonial* evidence'). The concluding portion, of the text quoted from Mr. Starkie shows, however, that he means to say that all facts which are proved in a case 'in the same manner as if they were the very facts in issue'—that is, by evidence of logical probative value, either direct (testimonial) or circumstantial, may serve as the basis from which further inference of fact may be drawn. This, as we have seen, is the true rule and is in accord with the great weight of authority. And since all 'facts in issue' may be proved by *circumstantial* evidence, as well as by *direct* or testimonial evidence, and every fact proved by circumstantial evidence is but an inference from such evidence, Mr. Starkie in truth says that where a fact is proved in a case *as a fact*, although by inference from circumstantial evidence, such *fact* may itself be taken as the basis for a new inference of fact.

"Indeed, when we consider the rule as stated by Bailey on Personal Injuries—i. e., 'An inference cannot be drawn from a presumption, but must be founded upon some fact legally established'—we see that the concluding portion of the sentence carries the same meaning as the quotation from Mr. Starkie when correctly understood, and as that expressed in *Henshaw v. State, supra*, above set forth."

Chinquapin Points: Venue: Intention.

A venerable lawyer from the wilds of "Old Kaintuck" was arguing his first case in the Supreme Court of the United States several decades ago. The justices of that venerable body kept plying him with questions, until his patience gave out. "If your Honors please," he finally exclaimed, "Ef you'll jest quit pestering me with your chinquapin pints and let me get down to the bowels of this case, I'll show you something."

We are often struck with the "chinquapin pints" made by our brethren of the bar in criminal cases, and we are much gratified at the way our Supreme Court dismisses them and gets down to "the bowels of the case." It was seriously claimed in a recent case that an indictment was concluded "against the peace and dignity of the Commonwealth of Virginia," was demurrable because the Constitution of the State, § 106, provided that indictments shall conclude, "against the peace and dignity of the Commonwealth." And this in the teeth of *Brown* v. *Commonwealth,* 86 Va. 466, decided in January, 1890. The Court very properly used the language of that case. "The mere statement of the objection to the conclusion of the indictment is a sufficient answer to it."

But this recent case—*Webb* v. *Commonwealth*—decided January, 1918—contains two important matters. One is that when the venue is laid as being in Giles County and the evidence shows that the offence took place in Newport, the Court will take judicial notice of the charter of Newport, an incorporated municipality, and that charter showing that Newport was in Giles County, it was sufficiently proven that the offence was committed in Giles.

The second matter of importance decided in this case was that intent can be inferred from circumstances and that if the jury believe certain circumstances are established showing intent, they have the right to infer the intent from those circumstances. This was a case in which a colored boy took at night a horse from a stable belonging to Dr. Givens in Newport and was caught several miles from that point riding away from it. He claimed he had only taken the horse to ride to see his girl and intended to return it before daybreak.

But the jury did not believe him and gave him a term in the penitentiary. The Court refused to disturb the verdict, saying that whilst it was true that in order to find the accused guilty it was essential for the Commonwealth to prove that original taking was felonious—yet whether or not there was such a felonious intent was a question of fact for the jury, and if from the whole evidence such intent might fairly be inferred the verdict of the jury should not be disturbed by an appellate court. "It has been well said," the Court says, "that there is not one case in a hundred where the felonious intent in the original case can be proved by direct evidence." From the nature of the case intent, generally must be inferred from circumstances. Booth *v.* Commonwealth, 4 Gratt. 552.